

1 Larry A. Hammond, 004049
2 Anne M. Chapman, 025965
3 OSBORN MALEDON, P.A.
4 2929 N. Central Avenue, 21st Floor
5 Phoenix, Arizona 85012-2793
6 (602) 640-9000
7 lhammond@omlaw.com
8 achapman@omlaw.com

9 John M. Sears, 005617
10 P.O. Box 4080
11 Prescott, Arizona 86302
12 (928) 778-5208
13 John.Sears@azbar.org

14 Attorneys for Defendant

15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,)	No. P1300CR20081339
)	
18 Plaintiff,)	Div. 6
)	
19 vs.)	OBJECTION TO STATE'S
)	MOTION TO EXTEND TIME
20 STEVEN CARROLL DEMOCKER,)	FOR ADDITIONAL
)	DISCLOSURE DATED AUGUST
21 Defendant.)	24, 2010
)	
)	
)	

22 Steven DeMocker, by and through counsel, hereby objects to the State's Motion
23 to Extend Time for Additional Disclosure pursuant to Rule 15.6(d) filed on August 24,
24 2010, and requests that the Court deny the State's Motion. This objection is based on
25 the due process clause, the confrontation clause, the Fifth, Sixth and Eighth

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 AUG 27 AM 8:57 ✓

JEANNE HICKS, CLERK

BY: Ivy Rios

1 Amendments and Arizona counterparts, Arizona Rules of Evidence, Arizona Rules of
2 Criminal Procedure and the following Memorandum of Points and Authorities.

3
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. The History of the State's Prior Failures to Comply with Rule 15.**

6 The defense has repeatedly detailed the State's failures to comply with Rule 15
7 and the Court's orders regarding disclosure. After repeated orders precluding evidence
8 under Rule 15 and dismissing death penalty aggravators based on disclosure violations,
9 on April 28, the Court reminded the State that if it did not comply with Rule 15.6, it
10 would not be permitted to use late disclosed evidence at trial. See April 8, 2010 Order,
11 April 28, 2010 Minute Entry, May 11, 2010 Minute Entry.

12 Trial started on May 4, 2010, with jury selection, and opening statements took
13 place on June 3. On June 17, Judge Lindberg became ill and was unable to continue
14 with trial. Judge Darrow was assigned to the case on July 2.

15 There are several pending motions related to the State's late disclosures. The
16 State provided a Notice of additional disclosure on July 15, 2010, relating to some of
17 the items included in the 72nd Supplemental disclosure. On July 20, the State filed a
18 Motion requesting the Court to extend the time to provide disclosure from the 72nd
19 Supplemental disclosure under Rule 15.6(d). The State disclosed four CDs of jail calls
20 and 52 pages of documents as part of a 72nd Supplemental disclosure provided to the
21 defense on July 21. Also on July 21, the State disclosed another CD of jail calls. The
22 defense filed a response to these motions on July 23, 2010. The Court currently has this
23 under advisement as well. The State made a 73rd Supplemental Disclosure in
24 accordance with his Court's Orders on August 5, 2010.

25 The State provided another Notice of additional disclosure on August 6, 2010.
26 As counsel noted in its response to this Notice, counsel speculated that perhaps the State
27
28

1 meant to file this Notice pursuant to 15.6(b). The Rule requires the State to identify the
2 disclosure, provide notice of the circumstances and explain when the disclosure will be
3 available. The State failed to comply with the Rule and the defense objected on August
4 10, 2010.

5
6 The State filed an additional motion for late disclosure on August 9 relating to
7 the 74th Supplemental disclosure. This disclosure included several CDs of jail calls and
8 previously precluded disclosure. The defense filed an objection and this issue is still
9 pending.

10 **II. The State's Most Recent Disclosure.**

11 Under Rule 15.6(d), if the State wants to disclose and use information within
12 seven days prior to trial, it must file a motion, supported by an affidavit requesting leave
13 to do so. Ariz. R. Crim. Pro. 15.6(d). The Court may either grant or deny the motion.
14 If the Court grants the motion, the Court may also issue sanctions. In considering
15 whether to grant the motion, the Court is to consider whether "the material or
16 information could not have been discovered or disclosed earlier even with due diligence
17 and the material or information was disclosed immediately upon its discovery."

18 *1. Jail Calls*

19 The State's Motion does not indicate that it is requesting additional time to use
20 the late disclosed jail calls at trial. For this reason, none of these jails calls are
21 admissible. The State's most recent disclosure includes 10 CDs of jail calls. Although
22 the State's disclosure indicates this information was disclosed on August 24, it was
23 actually dropped off through the mail slot after 6:00 but before 9:00 p.m. on August 24.
24 The Court previously ordered the State to identify which calls it intended to use and to
25 provide a summary of what it intended to use from each particular call. The cost in
26 terms of time and money for the defense to review and transcribe each and every phone
27
28

1 call is staggering and prohibitive.¹ The Court understands this and demanded that the
2 State identify what it intended to use with particularity. The State's disclosure of each
3 and every jail call does not comply with this Court's prior directives regarding jail call
4 disclosures. The Court should therefore preclude all jail calls for which the State has
5 not done what it was ordered to do. Also, the Court should direct the State to properly
6 identify any calls it intends to use and disclose those within three days as previously
7 ordered.

8 The most recent late disclosure includes the following jail phone calls: August
9 17-23, 2010. The only calls that were disclosed within the three days required by the
10 Court are from August 22 and 23. All calls from August 17-21 are not timely disclosed
11 pursuant to the Court's prior order and are therefore precluded. See April 13, 2010,
12 Minute Entry. The other calls should be precluded based on the State's failure to
13 identify with particularity, as required by the Court, what portions of what calls it
14 intends to use.

15 2. *Anonymous Letter*

16 Use of the anonymous letter as requested by the State's Motion would violate
17 both the prohibition against the use of hearsay and Mr. DeMocker's Constitutional right
18 under the Sixth Amendment and Arizona counterparts to Confrontation. The State's
19 late disclosure includes a one sentence typed letter from a purported "concerned
20 citizen." The envelope has no return address and appears to have been sent from
21 Phoenix. The letter is dated August 16 and the State's motion indicates it was received
22 by the Yavapai County Sheriff's Office on August 19. It was provided to the defense
23 on August 25 (after 6:00 p.m. on August 24). The State's Motion seeks leave of Court
24 to use the information at trial.

26
27 ¹ For example, to transcribe the 13 days of disclosed jail calls between mid-July and August, the estimate for
28 transcription is over \$2500.

1 The letter is hearsay. Hearsay is defined by Arizona Rule of Evidence 801(c).
2 "Hearsay is a statement, other than one made by the declarant while testifying at the
3 trial or hearing, offered in evidence to prove the truth of the matter asserted." The letter
4 purports to describe a "disguise" that Mr. DeMocker was allegedly wearing on the night
5 of Carol Kennedy's murder. There is no other possible reason for the introduction of
6 this letter other than for the "truth" of what it purports. The State offers no rationale as
7 to why it would be permitted to use this information or for what purpose. The State's
8 Motion to use the letter should be precluded on this basis.

9 Use of this letter by the prosecution would also violate Mr. DeMocker's Sixth
10 Amendment right to confront witnesses against him. "[T]he admission of testimonial
11 statements of a witness who did not appear at trial" is generally prohibited under the
12 Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354, 1365
13 (2004). "If proposed out-of-court statements will probably be considered by the jury for
14 the truth of the matters stated therein, the evidence should be considered the functional
15 equivalent of hearsay for Confrontation Clause purposes." *State v. Moss*, 215 Ariz. 385,
16 ¶ 18, 160 P.3d 1143, 1148 (App.2007). The *Crawford* Court made two observations:
17 First, the Court determined that "the principal evil at which the Confrontation Clause
18 was directed was the civil-law mode of criminal procedure, and particularly its use of *ex*
19 *parte* examinations as evidence against the accused." 541 U.S. at 50, 124 S.Ct. at 1363.
20 Next, the Court found "that the Framers would not have allowed admission of
21 testimonial statements of a witness who did not appear at trial unless he was unavailable
22 to testify, and the defendant had had a prior opportunity for cross-examination." 541
23 U.S. at 53-54, 124 S.Ct. at 1365. The Arizona Constitution, Article II, Section 24 also
24 requires that the accused shall have the right "to meet the witnesses against him face to
25 face."

1 Here Mr. DeMocker has had no opportunity to cross-examine or even know the
2 identity of the author of this letter. The State apparently does not know who or where
3 the letter came from either. There is no other indicia of reliability or any other
4 corroborating information to support the ridiculous assertions made in this letter. Use of
5 this letter would be a clear violation of Mr. DeMocker's rights under the Confrontation
6 Clause and the State's Motion should be denied on this basis as well.²

7
8 **CONCLUSION**

9 Defendant Steven DeMocker, by and through counsel, hereby requests that this
10 Court deny the State's Motion to Extend Time For Additional Disclosure and preclude
11 the State's use of the jail calls and the anonymous letter.

12 DATED this 27th day of August, 2010.

13
14 By: 

15 John M. Sears
16 P.O. Box 4080
17 Prescott, Arizona 86302

18 OSBORN MALEDON, P.A.
19 Larry A. Hammond
20 Anne M. Chapman
21 2929 N. Central Avenue, Suite 2100
22 Phoenix, Arizona 85012-2793

23 Attorneys for Defendant

24 ² This anonymous letter is easily distinguished from the anonymous email that is the subject of the State's Motion
25 for Reconsideration. Mr. DeMocker's Sixth Amendment and Arizona constitution Art II S 24 right to confront
26 witnesses against him protect him from the use of evidence that is his counsel is not able to cross-examine or
27 confront "face to face." Mr. DeMocker's right to present a complete defense pursuant to the due process clause,
28 the confrontation clause and the compulsory process clause pursuant to those same provisions as well as the
Fourteenth Amendment and Arizona counterparts, require that Mr. DeMocker be able to admit evidence of third-
party culpability that casts doubt on his guilt. The State's position in seeking to use the anonymous letter and
preclude the anonymous email would turn these fundamental constitutional principles on their head.

1
2 **ORIGINAL** of the foregoing hand delivered for
3 filing this 27th day of August, 2010, with:

4 Jeanne Hicks
5 Clerk of the Court
6 Yavapai County Superior Court
7 120 S. Cortez
8 Prescott, AZ 86303

9 **COPIES** of the foregoing hand delivered this
10 this 27th day of August, 2010, to:

11 The Hon. Warren R. Darrow
12 Judge Pro Tem B
13 120 S. Cortez
14 Prescott, AZ 86303

15 Joseph C. Butner, Esq.
16 Jeffrey Paupore, Esq.
17 Prescott Courthouse basket

18 

19 3269240